Supreme Court, U.S.
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In The

Supreme Court of the United States

KELMER DA SILVA NEVES,

Petitioner,

v.

ERIC HOLDER, U.S. ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the First Circuit Court of Appeals err in holding, post-*Kucana*, that it did not have jurisdiction to review a denial of a Motion to Reopen *sua sponte* although the Petitioner raised constitutional and legal issues that the majority of circuits have treated as reviewable?

2. Did the First Circuit Court of Appeals err in holding, post-*Kucana*, that it did not have jurisdiction to review a *sua sponte* Motion to Reopen although such determinations are governed, in relevant part, by the same statutory and regulatory framework as other reopening determinations?

PARTIES TO PROCEEDING

Kelmer Da Silva Neves, Petitioner

Eric Holder, U.S. Attorney General, Respondent

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OPINION AND JUDGMENT BELOW

The Court of Appeals' order is officially reported at 613 F.3d 30 and reprinted in the Appendix to the Petition at App. 1.

STATEMENT OF JURISDICTION

By judgment entered July 21, 2010, the United States Court of Appeals for the First Circuit dismissed Petitioner's petition for review. By judgment entered December 2, 2010, with Mandate issued on January 7, 2011, the United States Court of Appeals for the First Circuit denied Petitioner's petition for rehearing en banc.

Petitioner thereafter timely filed this Petition for Writ of Certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fifth Amendment to the United States Constitution, 5 U.S.C. § 701, 8 U.S.C. § 1252, 8 C.F.R. § 1240.10. The relevant statutory and constitutional provisions are set out in the appendix.

STATEMENT OF THE CASE

Petitioner was an applicant for asylum withholding of removal, and protection based upon Article 3 of the Convention Against Torture. The Immigration Judge denied the Petitioner's application for relief. Thereafter, the Petitioner filed a timely appeal with the Board of Immigration Appeals (BIA). By order dated December 3, 2003, the BIA affirmed the Immigration Judge's order. On June 30, 2006, Petitioner filed a second motion to reopen based upon ineffective assistance of counsel. On December 14, 2006, the BIA denied this Motion. Petitioner thereafter timely filed a Petition for Review with the United States Court of Appeals for the First Circuit. This petition for review was based on a final agency determination. 8 U.S.C. § 3.1(a)(7). The First Circuit had jurisdiction based upon 8 U.S.C. § 1252(a)(2)(B)(ii).

By judgment entered June 4, 2009, the First Circuit dismissed Petitioner's petition for review for lack of jurisdiction. By judgment entered September 3, 2009, with Mandate issued on September 17, 2009, the First Circuit denied Petitioner's petition for rehearing en banc.

The Petitioner timely appealed to the United States Supreme Court. By judgment entered on May 17, 2010, the Supreme Court granted the Writ and remanded the case to the First Circuit. By judgment entered July 21, 2010, the First Circuit dismissed Petitioner's petition for review. By judgment entered December 2, 2010, with Mandate issued on January

7, 2011, the First Circuit denied Petitioner's petition for rehearing en banc.

STATEMENT OF FACTS

Petitioner is a native and citizen of Brazil and entered the United States as a B-2 visitor in 1999. Petitioner retained Joarez Reis, who he believed to be an attorney, to represent him in his applications for asylum, withholding of removal, and protection under the Convention against Torture. On November 1, 2000, the Immigration Judge denied these applications for relief. Thereafter, on November 21, 2000, Mr. Reis filed a Notice of Appeal to the BIA on behalf of the Petitioner. However, since Mr. Reis was not a licensed attorney, he put a post office box [rented by Mr. Reis] as the forwarding address and signed the Petitioner's name. *See* Administrative Record ("AR") 20.

On September 25, 2001, the Board dismissed the appeal, deeming it abandoned because there was not an address to which the mail could be effectively sent.

While Petitioner's appeal was pending, Mr. Reis fled Massachusetts to avoid criminal prosecution. By the time of the Board's decision, Mr. Reis had been arrested by the FBI and was later convicted and imprisoned for 54 counts of mail fraud and lying to the government. AR 22-29.

In the meantime, in December 2000, the Petitioner retained another attorney, John Dvorak, to file a Labor Certificate under section 245(i). The Petitioner informed Attorney Dvorak of his appeal pending with the BIA. However, he did not file a Notice of Appearance until April 2002. AR 31. The Board forwarded a copy of the September 25, 2001 decision. Attorney Dvorak stated that he would file a Motion to Reopen the proceedings. In May 2003, Petitioner went to Attorney Dvorak's office to inquire about the Motion and discovered that nothing had been filed. Thereafter, Petitioner discharged Attorney Dvorak. AR 33.

Then, Petitioner retained Gary Yerman. In August 2003, Attorney Yerman filed a Motion to Reopen the Petitioner's proceedings. Mr. Yerman's motion was based on the requirements of *In re Lozada*, 19 I. & N. 637 (BIA 1988); however, he failed to attach the appropriate documentation in support of the case. Furthermore, Attorney Yerman failed to request the appropriate relief since the Petitioner was eligible for Adjustment of Status under the Section 245(i) and the LIFE Act. AR 35. Petitioner frequently contacted Mr. Yerman's office to inquire about the status of the Motion. In June 2006, the Petitioner discovered that the Motion had been denied on December 3, 2003. Petitioner discharged Attorney Yerman and retained Joseph Rose to file a subsequent Motion to Reopen.

STATUTORY AND REGULATORY BACKGROUND

Reopening determinations are governed by a series of statutes and regulations. The reopening procedure dates at least as far back as 1916. The BIA first regularized Motions to Reopen in 1958. *Dada v. Mukasey*, 554 U.S. 1, 13 (2008) (*citing* 23 Fed. Reg. 9115, 9118-19 (1958)). The 1958 regulation provided that "[t]he Board may on its own motion reopen or reconsider any case in which it has rendered a decision." 8 C.F.R. § 3.2 (1959).

The formal distinction between a "motion to reopen" and a "motion to reopen sua sponte" dates to 1990, when "Congress ordered the Attorney General to 'issue regulations with respect to . . . the period of time in which motions to reopen . . . may be offered in deportation proceedings,' including 'a limitation on the number of such motions that may be filed and a maximum time period for the filing of such motions.'" *Dada*, 554 U.S. at 13 (*quoting* Immigration Act of 1990, Pub. L. No. 101-649, § 545(d)(1), 104 Stat. 4978, 5066) (ellipses in original). The resulting regulation, which is set out in its current form at 8 C.F.R. § 1003.2, not only provides that the Board "may at any time reopen or reconsider on its own motion any case in which it has rendered a decision," but also sets forth procedures for a party to file his or her own motion. 8 C.F.R. §§ 1003.2(a) and (c).

The Board's power to reopen *sua sponte* or on "its own motion" may be invoked (and typically is invoked)

by a motion from a party. With respect to an ordinary motion to reopen, of the type addressed by this Court in *Kucana v. Holder*, 130 S. Ct. 827 (2010), a party has the right to file a single motion within 90 days of the decision to be reopened, and the regulation sets forth various substantive prerequisites that such a motion must satisfy in order to be considered. 8 C.F.R. § 1003.2(c)(1). Satisfaction of these criteria, however, is not necessarily sufficient to obtain reopening under § 1003.2(c), which provides that "[t]he decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board," and gives the Board "discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief." 8 C.F.R. § 1003.2(a).

The substantive standards that apply to so-called *sua sponte* reopening are set out in the BIA's own binding precedent. The BIA employs an "exceptional circumstances" or "exceptional situation" standard in determining whether to grant such a motion. E.g., *In re Beckford*, 22 I. & N. Dec. 1216 (BIA 2000); *In re J-J-*, 21 I. & N. Dec. 976 (BIA 1997). The same regulation quoted above gives the Board discretion to grant relief in the *sua sponte* context as well. 8 C.F.R. § 1003.2(c). Until 1996, there was no explicit statutory authorization for reopening procedures of any sort. Instead, the Attorney General had identified the general grant of rulemaking authority for immigration matters, currently set out at 8 U.S.C. § 1103(a), as the basis for the regulations. *See, e.g.*, 23 Fed. Reg. at 9117; *Kucana*, 130 S. Ct. at 840 (Alito, J., concurring in the judgment). In 1996, Congress

for the first time dictated procedures for motions to reopen. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, 3009-593. The statute, now codified at 8 U.S.C. § 1229a(c)(7), "guarantees to each alien the right to file 'one motion to reopen proceedings,'" *Dada*, 554 U.S. at 15, and "simply lays out the requirements an alien must fulfill when filing a motion to reopen," *Kucana*, 130 S. Ct. at 833 n.6 (*quoting Kucana v. Mukasey*, 533 F.3d 534, 541 (7th Cir. 2008) (Cudahy, J., dissenting)). Those procedural requirements, however, do not touch on the Attorney General's authority to decide motions to reopen. Rather, as the Court explained in *Kucana*, the statute "is not directed to the agency's discretion to grant or deny motions to reopen." *Id.*

REASONS FOR GRANTING THE WRIT

Writ of Certiorari should be granted in this case in order for this Honorable Court to address the issues of significant legal importance regarding whether an Article III court has jurisdiction to review a constitutional claim embedded in a motion to reopen *sua sponte*. *Kucana v. Holder*, 130 S. Ct. 827, 840 (2010). There is a division among the lower courts concerning judicial review in immigration cases involving motions to reopen "sua sponte." Two similar cases have also petitioned this Court to review this issue: *Gor v. Holder*, 607 F.3d 180 (6th Cir. 2010) and *Ochoa v. Holder*, 604 F.3d 546, 549 n.3 (8th Cir. 2010).

In *Kucana*, the Supreme Court rejected the idea that an agency can curtail the jurisdiction of an Article III court and held that "[a]ction on motions to reopen, made discretionary by the Attorney General only, remain subject to judicial review." *Kucana*, 130 S. Ct. at 840.

The regulation, 8 C.F.R. § 1003.2, which is at issue in *Kucana*, is the same one that this Court of Appeals has held defines the BIA's discretion over *sua sponte* reopening so broadly as to preclude review. Several sister courts have suggested that they retain jurisdiction to review constitutional challenges to BIA refusals to reopen proceedings *sua sponte*. *Nawaz v. Holder*, 314 F. App'x 736, 736 (5th Cir. 2009); *Lenis v. U.S. Attorney Gen.*, 525 F.3d 1291, 1294 (11th Cir. 2008). In this case, the Petitioner has established that the BIA committed an "error of law or exercised its judgment in an arbitrary, capricious, or irrational way." *Tandayu v. Mukasey*, 521 F.3d 97, 100 (1st Cir. 2008) (*quoting Raza v. Gonzales*, 484 F.3d 125, 127 (1st Cir. 2007)); *see also Chen v. Gonzales*, 415 F.3d 151, 153 (1st Cir. 2005) ("An abuse of discretion exists where the BIA misinterprets the law, or acts either arbitrarily or capriciously.") (*quoting Toban v. Ashcroft*, 385 F.3d 40, 45 (1st Cir. 2004)). The Petitioner has established that the arbitrary and standardless denial of his Motion to Reopen has resulted in a due process violation of his Constitutional rights. This Court's intervention is necessary to resolve the circuit

conflict and provide needed guidance to the lower courts.

ARGUMENT OF THE FIRST ISSUE

1. Article 3 Courts have jurisdiction to review Constitutional and Legal questions.

This case presents an issue of significant legal importance regarding whether an Article III court has jurisdiction to review a constitutional claim embedded in a motion to reopen *sua sponte*. Currently, the Circuit courts are split concerning jurisdiction to review denials of Motions to Reopen *sua sponte* based upon constitutional issues or questions of law.

Almost every Court of Appeals, has clearly held that review is available for constitutional and statutory questions. For example, the Second Circuit has held that it has jurisdiction to consider legal claims. *See Rosario v. Holder*, 627 F.3d 58, 61 (2d Cir. 2010) (holding that it can "review 'all constitutional claims or questions of law' raised by the BIA's exercise of its discretion" (*quoting Argueta v. Holder*, 617 F.3d 109, 112 (2d Cir. 2010))).

In explaining the boundaries of its review, the Second Circuit stated: "We ask whether the BIA is expressing legal doctrine or whether it is engaged in the factfinding and factor-balancing that are at the core of its discretion." *Rosario*, 627 F.3d at 62. Eight other Courts of Appeals (the First, Third, Fifth,

Seventh, Eighth, Ninth, Tenth, and Eleventh) have previously adopted this position or a close variant of it. *See, e.g., Luis v. INS*, 196 F.3d 36, 41 (1st Cir. 1999) ("This court has jurisdiction to review Luis's due process claim." (*citing Bernal-Vallejo v. INS*, 195 F.3d 56, 64 (1st Cir. 1999))); *Cruz v. Att'y Gen. of U.S.*, 452 F.3d 240 (3d Cir. 2006) (holding that there would be jurisdiction to review denial where underlying conviction had been vacated); *Nawaz v. Holder*, 314 F. App'x 736, 737 (5th Cir. 2009) ("'While we do not have jurisdiction to consider Nawaz's nonconstitutional challenges to the BIA's refusal to reopen his removal proceedings sua sponte, we retain jurisdiction to consider constitutional challenges that were raised before the BIA."); *Cevilla v. Gonzales*, 446 F.3d 658, 660-61 (7th Cir. 2006) (Posner, J.) (implying that grounds involving "the application of a legal standard" are reviewable); *Tamenut v. Mukasey*, 521 F.3d 1000, 1005 (8th Cir. 2008) (en banc) ("Although this court lacks jurisdiction over Tamenut's challenge to the BIA's decision not to reopen sua sponte, we generally do have jurisdiction over any colorable constitutional claim."); *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1106 (9th Cir. 2006) (jurisdiction to review where a "'key part' of the government's case [for] removal," such as the validity of a predicate criminal conviction, is challenged); *Belay-Gebru v. INS*, 327 F.3d 998 (10th Cir. 2003) (finding decisions discretionary but *citing Luis*, 196 F.3d at 40); *Lenis v. U.S. Att'y Gen.*, 525 F.3d 1291, 1294 n.7 (11th Cir. 2008) ("[A]n appellate court may have jurisdiction over

constitutional claims related to the BIA's decision not to exercise its sua sponte power.").

These Courts of Appeals have recognized that claims of the sort presented in this case, such as ineffective assistance of counsel, are the types of constitutional and legal questions for which there is jurisdiction. For example, courts have found jurisdiction to hear appeals where the petitioner's claim concerns a denial of due process stemming from ineffective counsel. *See Bernal-Vallejo v. INS*, 195 F.3d 56, 64 (1st Cir. 1999) (holding that there was jurisdiction to hear "Bernal's claim of ineffective assistance of counsel amounting to a due process violation [because that] argument does not involve a matter that Congress committed to agency discretion."); *Mendiola v. Holder*, 585 F.3d 1303, 1309-10 (10th Cir. 2009) (jurisdiction "where the motion alleges ineffective assistance of counsel rising to the level of a due process violation"), *cert. denied*, 131 S. Ct. 502 (2010).

By contrast, the First, Sixth and Fourth Circuits' refusal to exercise jurisdiction over constitutional and legal claims is out of step with the practice of most other Courts of Appeals. Both the Sixth and Fourth Circuits took the position that review was unavailable for denials of *sua sponte* reopening even in cases that involved constitutional or statutory questions. *Mosere v. Mukasey*, 552 F.3d 397, 400 (4th Cir. 2009) (stating categorically that there is no jurisdiction to review *sua sponte* denials of reopening).

As such, the decision in this case is contradictory to the majority of the other Courts of Appeals.

ARGUMENT OF THE SECOND ISSUE

2. Motions to reopen *sua sponte* are governed by the same statutory provisions of which *Kucana* has held are reviewable.

In this case, the First Circuit has held that "*Kucana* does not affect the subsidiary holding in our earlier opinion that federal courts lack jurisdiction to review the BIA's decision to exercise *sua sponte* authority to reopen proceedings." The First Circuit states that such decisions are "committed to the BIA's unfettered discretion" by law. 8 C.F.R. § 1003.2(a); *Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999); *Caldero-Guzman v. Holder*, 577 F.3d 345, 348 (1st Cir. 2009).

Kucana held that § 1252, the same grant of jurisdiction that is at issue here, could not be construed to permit the "extraordinary delegation" that would "free the Executive to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions 'discretionary.'" 130 S. Ct. at 830. Accordingly, *Kucana* held that reopening determinations under 8 C.F.R. § 1003.2(a) were to be reviewed for abuse of discretion. Given that the BIA's decision to reopen *sua sponte* is made discretionary only by regulation, and not by any statute, the Seventh Circuit has applied abuse of discretion review to such decisions,

just as it does to review of non-*sua sponte* decisions to reopen after *Kucana*. *Munoz de Real v. Holder*, 595 F.3d 747, 750 (7th Cir. 2010).

The First Circuit has held in this case that *Kucana* has not changed the terms of reviewability of *sua sponte* reopening determinations. Other circuits have also applied this interpretation. *Ruiz v. Holder*, 374 F. App'x 170, 173 (2d Cir. 2010); *Ochoa v. Holder*, 604 F.3d 546, 549 n.3 (8th Cir. 2010); *Jaimes-Aguirre v. U.S. Att'y Gen.*, 369 F. App'x 101, 103 (11th Cir. 2010).

However, these circuits have come to this conclusion, relying on precedent decisions that are no longer applicable. In the Sixth Circuit, the lead opinion stated that the panel was bound by two prior Sixth Circuit cases holding that reopening decisions were unreviewable, but explained that "the Supreme Court's reasoning set out in *Kucana* undermines the continuing validity of [those cases], since both cases are based on the same premise rejected in *Kucana*": that an agency can "insulate its own decisions from judicial review" by regulation. *Gor v. Holder*, 607 F.3d 180 (6th Cir. 2010).

The First Circuit plainly refused to apply *Kucana*'s central holding without explanation. In deeming such decisions unreviewable, that result directly contradicts *Kucana*'s central holding. *Kucana v. Holder*, 130 S. Ct. 827, 840 (2010). In *Kucana*, the Supreme Court rejected the idea that an agency can curtail the jurisdiction of an Article III court and held that

"[a]ction on motions to reopen, made discretionary by the Attorney General only, remain subject to judicial review." *Id.* at 840.

The regulation, 8 C.F.R. § 1003.2, which is at issue in *Kucana*, is the same regulation that this Court of Appeals has determined defines the BIA's discretion over *sua sponte* reopening so broadly as to preclude review. In *Kucana*, the Court interpreted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009-546 to assess whether it stripped the Circuit courts of jurisdiction to review motions to reopen. The Court noted that Congress had not codified the provision in the regulation making such decisions discretionary. The Court read the phrase "specified under this subchapter" in section 1252(a)(2)(B)(ii) to mean that "Congress barred court review of discretionary decisions only when Congress itself set out the Attorney General's discretionary authority in the statute." *Kucana*, 130 S. Ct. at 836-37.

The Court concluded that Congress intended judicial review of motions to reopen to be as broad as it was before the IIRIRA was enacted: "The BIA has broad discretion, conferred by the Attorney General, 'to grant or deny a motion to reopen,' 8 C.F.R. § 1003.2(a), but courts retain jurisdiction to review, with due respect, the Board's decision." *Kucana*, 130 S. Ct. at 838. The Court found the idea of an agency regulation placing a matter beyond court jurisdiction to contravene the "presumption 'that executive determinations are generally subject to judicial review,'" *id.* at 839

(*quoting Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995)), "the longstanding exercise of judicial review of administrative rulings on reopening motions," *id.* at 831, and the "congressional design" that "[Congress], and only [Congress], would limit the federal courts' jurisdiction," *id.* at 839-40. Otherwise, the agency "would have a free hand to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions 'discretionary.'" *Ibid.*

Therefore, the argument that review of the denial of the Petitioner's motion to reopen is barred by the confluence of 8 U.S.C. § 1252(a)(2)(B)(ii) and 8 C.F.R. § 1003.2(4) fails. An agency cannot strip a court of jurisdiction to review its own actions by enacting regulations that deem these actions discretionary. Such authority would fundamentally alter the constitutional checks and balances put in place by the separation of powers doctrine. *See Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) (holding that under the separation of powers doctrine, only Congress can expand or contract the subject-matter jurisdiction of a lower Article III court); *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) ("Congress has the constitutional authority to define the jurisdiction of the lower federal courts."); *INS v. Chadha*, 462 U.S. 919, 957-58 (1983) (holding that Congress may alter federal court jurisdiction through legislation, but to do so it must satisfy the requirements of bicameralism and presentment). *Kucana* reinforces the *Heckler v. Chaney*, 470 U.S. 821 (1985) decision that the

narrow exception to judicial review of agency decisions must originate from Congress, not the agency itself.

The majority of cases, including *Luis* and *Caldero-Guzman,* that find no jurisdiction to review denials of motions to reopen *sua sponte* do so on the basis of standardless regulations. *See, e.g., Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999); *Caldero-Guzman v. Holder*, 577 F.3d 345, 348 (1st Cir. 2009); *Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003); *Doh v. Gonzales*, 193 F. App'x 245, 246 (4th Cir. 2006) (*per curiam*); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248-50 (5th Cir. 2004); *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebru v. INS*, 327 F.3d 998, 1000-01 (10th Cir. 2003); *Anin v. Reno*, 188 F.3d 1273, 1279 (11th Cir. 1999).

The only two cases that cite a statute in concluding that such decisions are unreviewable point to 8 U.S.C. § 1103(g)(2), which generally authorizes "[t]he Attorney General [to] establish such regulations as the Attorney General determines to be necessary for carrying out this section." *See Tamenut v. Mukasey*, 521 F.3d 1000, 1004 (8th Cir. 2008) (*en banc*) (*per curiam*) ("The regulation establishing the BIA's authority to reopen sua sponte was promulgated pursuant to a general grant of regulatory authority that sets no standards for this decision. See 8 U.S.C. § 1103(g)."); *Lenis v. U.S. Attorney Gen.*, 525 F.3d

1291, 1293 (11th Cir. 2008) ("[N]o statute expressly authorizes the BIA to reopen cases sua sponte; rather, the regulation at issue derives from a statute that grants general authority over immigration and nationalization matters to the Attorney General, and sets no standard for the Attorney General's decision-making in this context. See 8 U.S.C. § 1103(g)(2).")

In this case, the First Circuit determined that it does not have jurisdiction to review the Petitioner's *sua sponte* Motion to Reopen. In its decision, the fate of the Petitioner lies in the BIA's whimsical statement that the Board "declined to exercise our sua sponte authority." AR 2. The BIA does not give any rationale or explanation for its decision. However, this court concedes that the BIA cannot exercise its authority arbitrarily, irrationally, or in a manner that is contrary to the law or the Constitution. *Tandayu v. Mukasey*, 521 F.3d 97, 100 (1st Cir. 2008) (*quoting Raza v. Gonzales*, 484 F.3d 125, 127 (1st Cir. 2007)); *see also Chen v. Gonzales*, 415 F.3d 151, 153 (1st Cir. 2005) ("An abuse of discretion exists where the BIA misinterprets the law, or acts either arbitrarily or capriciously.") (*quoting Toban v. Ashcroft*, 385 F.3d 40, 45 (1st Cir. 2004)). As such, the BIA has arbitrarily and irrationally denied the Petitioner's motion resulting in a due process violation that is contrary to the Constitution.

ARGUMENT OF THE THIRD ISSUE

3. Petitioner has established a prima facie case for ineffective assistance of counsel which has resulted in a due process violation of his rights.

Petitioner has presented a prima facie case of ineffective assistance of counsel which has resulted in a due process violation of the Petitioner's rights. The First Circuit has erred in its statement that the Petitioner did not make any constitutional claims in his appeal. The crux of Mr. Neves' appeal is that the BIA's denial of the Petitioner's Motion to Reopen has resulted in a violation of his Constitutional right to due process. Several Courts of Appeals and the BIA have held that the ineffective assistance of counsel in removal proceedings can constitute a due process violation. *See, e.g., Denko v. INS*, 351 F.3d 717, 724 (6th Cir. 2003); *Fadiga v. Attorney General of the United States*, 488 F.3d 142, 153 (3d Cir. 2007) ("claims of ineffective assistance of counsel in immigration proceedings are grounded in the 'Fifth Amendment right to due process.'"); *Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005); *Surganova v. Holder*, 612 F.3d 901, 907 (7th Cir. 2010) ("[W]e have recognized that the denial of effective assistance of counsel may under certain circumstances violate the due process guarantee of the Fifth Amendment."); *In re Lozada*, 19 I. & N. Dec. 637 (BIA 1988). Cf. *Mohammed*, 400 F.3d at 793 (recognizing that a due process violation occurs when "the proceeding was so fundamentally unfair that the alien was

prevented from reasonably presenting his case" (*quoting Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004))).

The Constitutional claim is embedded in the fact that Mr. Neves has established a prime facie case for ineffective assistance of counsel. Neves repeatedly argued this point in his initial brief:

> "Ineffective assistance of counsel is a denial of **due process under the Fifth Amendment** if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." Petitioner's Brief at 13.
>
> Consequently, these actions had serious implications on the Petitioner. First, he was **denied due process** rights to appeal his asylum claim and apply for subsequent relief. Secondly, he was **denied his due process** right to file a Motion to Reopen and Remand within the proscribed period. [The BIA's decision denied the case based on timeliness.] Petitioner's Brief at 17.
>
> Counsel's ineffectiveness gives rise to a **due process violation** since the proceeding was so fundamentally unfair that Petitioner was prevented from reasonably presenting his case. *See Lozada, supra*; *Bernal-Vallejo v. INS*, 195 F.3d 56 (1st Cir. 1999). Petitioner's Brief at 18.
>
> The Court may find a **due process violation** where counsel's actions prevent the

> Petitioner from applying for discretionary relief. *Id.*; *Hernandez v. Reno*, 238 F.3d 50 (1st Cir. 2001). Petitioner's Brief at 18.

As such, the Petitioner continually argued that his case presents a constitutional issue in that there was a due process violation of his right to present his case due to ineffective assistance of counsel. The First Circuit had previously determined "Because the ineffective assistance claim is not before us . . . we are presented with no "constitutional claim[ ]." *Boakia v. Gonzalez*, 447 F.3d 1, 4 (1st Cir. 2006); 8 U.S.C. § 1252(a)(2)(D). Here, the First Circuit contradicted its own precedent as it previously concluded that a constitutional claim is embedded in a case involving ineffective assistance of counsel.

In this case, the Petitioner did clearly present a prima facie case for ineffective assistance of counsel and his resulting constitutional claim of a violation of due process. Here, the First Circuit has contradicted its own precedent and other circuits in determining that there was not a constitutional claim in this case. If a decision "decides to depart significantly from its own precedent, it must confront the issue squarely and explain why the departure is reasonable." *Ricardo Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994).

This court does have jurisdiction under REAL ID to review constitutional questions and the Petitioner has raised a constitutional question here. 8 U.S.C. § 1252(a)(2)(D) (2005). This Court has jurisdiction to

review whether the Petitioner's counsel was so ineffective that Petitioner was unable to present his adjustment of status application based on his eligibility under section 245(i). *See Do Nascimento v. Mukasey*, 549 F.3d 12, 17 (1st Cir. 2008).

The Petitioner has been irreparably harmed by this due process violation in that he has a removal order and will be barred from reentry into the United States for 10 years. These issues were repeatedly elaborated in the Petitioner's initial brief, supplemental brief, as well as the Petitioner's brief in response to the Court order after the remand from the Supreme Court. This constitutional claim is embedded in the Petitioner's argument that the BIA abused its discretion in failing to consider these constitutional issues in their denial of the Motion to Reopen and Motion to Reopen *sua sponte*. "[D]eportation is a drastic measure and at times the equivalent of banishment or exile." *Jordan v. DeGeorge*, 341 U.S. 223, 231 (1951) (internal quotation marks omitted). Removal "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty – at times a most serious one – cannot be doubted." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). Given the severity of removal, this Court has emphasized that motions to reopen are an "important safeguard" designed to "ensure a proper and lawful disposition" of an alien's case. *Dada*, 554 U.S. at 3. This circuit court does have jurisdiction to

review the constitutional question embedded in the Petitioner's Motion to Reopen *sua sponte*.

Furthermore, the "due diligence" standard used by the First Circuit should be reviewed by the Panel in that it is erroneous as it does not take into account the fact that ineffective assistance of counsel constitutes "exceptional circumstances . . . beyond the control of the alien." Due diligence requires an alien to prove that the delay in filing the motion to reopen was due to "an exceptional circumstance beyond his control." *Scorteanu v. INS*, 339 F.3d 407, 414 (6th Cir. 2003); *see also Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003). The BIA has determined that reopening a case *sua sponte* may be used in exceptional circumstances and is not meant to circumvent the regulations. *In re J-J-*, 21 I. & N. Dec. 976 (BIA 1997).

In this case, Petitioner has demonstrated exceptional circumstances and that he did act with "due diligence" in accordance with the standard set forth in precedent case law. *Jobe v. INS*, 212 F.3d 674, *rev'd en banc*, 238 F.3d 96 (1st Cir. 2001), *Boakai v. Gonzales*, 447 F.3d 1, 3 (1st Cir. 2006).

The decision in this case is clearly erroneous as it does not account for the role of the incompetent attorney in its "due diligence" analysis. "An attorney in the deportation process is especially important. For the alien unfamiliar with the laws of our country, an attorney serves a special role in helping the alien through a complex and completely foreign process. It is therefore reasonable for an alien to trust and

rely upon an attorney's advice." *Juan Monjarez-Munoz v. INS*, 327 F.3d 892 (9th Cir. 2003). This trust could reach to such an extent that if an alien fails to perform because of an attorney, "we can say that this is an exceptional circumstance 'beyond the control of the alien.'" *Id.* Similarly, the BIA's decision in *In re Grijalva*, 21 I. & N. Dec. 472 (BIA 1996), also lends support to the proposition that an alien's failure to attend a hearing based on negligent advice from an attorney constitutes an exceptional circumstance. This standard is clearly used in absentia proceedings and results in the rescinding of the removal order. 8 U.S.C. § 1229a(e)(1). This case presents identical circumstances which should result in the same outcome.

The Petitioner has established a prima facie case for ineffective assistance of counsel which was affirmed by the BIA. The First Circuit and BIA erred in this case by stating that the Petitioner failed to provide specific evidence to corroborate his assertion of due diligence. In a recent case, it was recognized that sworn affidavits from counsel must be considered evidence by the BIA. *Kulhawik v. Holder*, 571 F.3d 296, 298 (2d Cir. 2009). The Board failed to give proper weight to the sworn affidavit from Petitioner's prior counsel which detailed the actions taken by the Petitioner and by his Law Office. It is clear that the Petitioner relied on his attorney's representations that the decision has not been made on his case. This reliance is reasonable for the period of time that the Petitioner argues should be "tolled" as the BIA does not have a time limitation for responding to such

motions. The BIA may take months to multiple years to make a determination on a case. The Petitioner acted reasonably and with diligence considering his utmost reliance on assurances made from his counsel.

Here, an issue of law is raised in that the Board's decision was arbitrary and capricious in its finding that this case does not warrant exceptional circumstances and the Petitioner did not act diligently. Where the Board has exercised its authority in an arbitrary, capricious, or irrational matter, this Court must remand to the Board. *Kichichian v. Mukasey*, 535 F.3d 15, 22 (1st Cir. 2008). It is clear that the BIA has not followed its own precedent in determining that this case does not warrant exceptional circumstances. *In re J-J-*, *supra*. The decision by the Board is a reversible error of law that must be reviewed. In its analysis of due diligence, this Court must focus on the length of time that an alien failed to inquire into their status due to ineffective assistance of counsel and the length of time that an alien failed to act after the alien had knowledge of the attorney's error. *See Beltre-Veloz v. Mukasey*, 55 F.3d 7, 11 (1st Cir. 2008) (lack of due diligence where alien did not inquire into status for eight years despite knowledge of proceedings); *Do Nascimento v. Mukasey*, 549 F.3d 12, 18 (1st Cir. 2008); *see Boakia v. Gonzalez*, 447 F.3d 1, 4 (1st Cir. 2006) (lack of due diligence where Petitioner failed to file new motion for six months after hiring new counsel). In this instance, the Board erred in its application of the facts to its own precedent. The Petitioner here has shown that he consistently inquired about his case with his counsel. Petitioner

has also shown that he hired new counsel immediately upon learning of the ineffective assistance of counsel and that said counsel filed a Motion to Reopen on behalf of Petitioner within a month of being hired.

The Petitioner is a victim of ineffective assistance of counsel and has presented constitutional and legal issues that should be reviewable to ensure uniformity and justice.

CONCLUSION

Wherefore, based on the foregoing, Petitioner respectfully asks that this Petition for a Writ of Certiorari be granted and that the Petitioner be granted relief.

The First Circuit panel has clearly deviated from other circuits and its own established precedent. It is within the interests of justice that this Honorable Court grants certiorari of this case.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 07-1091

KELMER DA SILVA NEVES,

Petitioner,

v.

ERIC H. HOLDER, JR.,* ATTORNEY GENERAL,

Respondent.

ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

Before
Lynch, *Chief Judge*,
Torruella and Ebel,** *Circuit Judges*.

Saher Joseph Macarius with whom Audrey Botros and Law Offices of Saher Joseph Macarius were on brief for petitioner.

Stacey I. Young, Trial Attorney, Office of Immigration Litigation, Civil Division, with whom Tony

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* Pursuant to Fed. R. App. P. 43(c)(2), Attorney General Eric H. Holder, Jr. has been substituted for former Attorney General Michael B. Mukasey as the respondent.

** Of the Tenth Circuit, sitting by designation.

West, Assistant Attorney General, and Joshua E. Braunstein, Assistant Director, Office of Immigration Litigation, were on brief for respondent.

July 21, 2010

PER CURIAM. Kelmer Da Silva Neves, a native and citizen of Brazil, petitions for review of the Board of Immigration Appeals's (BIA) December 14, 2006, denial of his second motion to reopen proceedings. The government's efforts to remove him from the country started in 1999. We deny the petition.

Neves's second motion to reopen was time- and number-barred under 8 U.S.C. § 1229a(c)(7)(A), (C)(i) and 8 C.F.R. § 1003.2(c)(2). Save for several exceptions not at issue here, those provisions allow an alien to file only one motion to reopen proceedings based on new facts and require the alien to do so within ninety days after the final order of removal. Neves argued before the BIA that he was nonetheless entitled to equitable tolling of these filing requirements, or in the alternative that the BIA should sua sponte reopen proceedings, because of ineffective assistance of counsel. The BIA found that Neves was ineligible for equitable tolling because he had failed to show he had exercised due diligence in pursuing his claim and declined to exercise its *sua sponte* authority to reopen.

This court initially denied Neves's petition on the ground then urged by the government: that the BIA's finding of a lack of due diligence, on which the denial primarily rested, was a factual determination that federal courts lacked jurisdiction to review. *See Da Silva Neves* v. *Holder*, 568 F.3d 41, 42-43 (1st Cir. 2009) (per curiam). This court further held that it lacked jurisdiction to review the BIA's discretionary denial of *sua sponte* reopening. *Id.* at 43. Neves filed a petition for a writ of certiorari in the Supreme Court.

While Neves's petition was pending, the Supreme Court decided *Kucana* v. *Holder*, 130 S. Ct. 827 (2010), in which it held that decisions on motions to reopen proceedings, like other proceedings made discretionary by regulation and not by statute, are generally subject to judicial review. *Id.* at 831, 840. In light of *Kucana*, in its reply brief to Neves's petition for writ of certiorari, the government abandoned its earlier jurisdictional position and recommended that the case be granted, vacated, and remanded. The Supreme Court granted certiorari and vacated and remanded the case to this court "for further consideration in light of *Kucana* v. *Holder*." *Neves* v. *Holder*, No. 09-650, 2010 WL 1946733, at *1 (U.S. May 17, 2010) (mem.).

We hold that we have jurisdiction to review the BIA's decision to deny equitable tolling of the time and number limitations governing Neves's second motion to reopen but not to review the BIA's refusal to exercise its *sua sponte* authority to reopen. Even assuming arguendo that equitable tolling of these requirements is available, the BIA did not abuse its

discretion in denying the motion. The BIA did not abuse its discretion in finding that Neves failed to show he had exercised due diligence in pursuing reopening, and substantial evidence supported that factual determination.

I.

Neves entered the United States as a B-2 visitor in 1999 and overstayed. On December 2, 1999, the Immigration and Naturalization Service (INS) issued a Notice to Appear. Neves conceded removability and applied for asylum and withholding of removal, claiming political persecution.

On November 1, 2000, an Immigration Judge (IJ) denied Neves's application for asylum and withholding of removal, finding that he was not credible on his claims of past persecution in Brazil and that his claims did not amount to persecution in any event. The IJ found Neves ineligible for voluntary departure. At this point, Neves was being represented by Joarez Reis, who had falsely represented himself as being a licensed attorney. Reis filed a notice of appeal to the BIA, and he listed as the forwarding address for correspondence a post office box that Reis had rented and that Reis had stopped checking when he fled criminal prosecution in Massachusetts. The BIA sent notice to that address.

Neves hired John Dvorak as his new attorney in June 2001, but Dvorak did not file an appearance until April 2002. On September 25, 2001, the BIA

dismissed Neves's appeal as moot. Specifically, because the BIA was unable to reach Neves by mail at the address Reis had given the court, the BIA concluded that Neves's appeal had apparently been abandoned.

Nearly two years later, on August 21, 2003, Neves filed his first motion to reopen, requesting reconsideration of the BIA's September 2001 decision and reinstatement of voluntary departure. At this point, Neves was represented by yet another attorney, Gary Yerman. Neves acknowledged that his first motion to reopen was untimely. Neves argued that the BIA should nonetheless consider the motion because the abandonment of his appeal by Reis and the delay in filing his motion to reopen were caused by the ineffective assistance of Neves's former representatives, Reis and Dvorak. Neves also admitted that he had learned of the BIA's prior order in August 2002 but waited another year to file his first motion to reopen.

On December 3, 2003, less than four months later, the BIA denied this motion as untimely and held that Neves was ineligible for equitable tolling. In addition to rejecting Neves's ineffective assistance claim, the BIA found that Neves had not exercised due diligence in pursuing his claim. A year had elapsed between August 2002, when Neves acknowledged he had learned of the BIA's September 2001 decision, and August 2003, when Neves filed his motion to reopen. The denial of this first motion to reopen was not the subject of a timely petition for review and is not before us.

Two and a half years later, on June 30, 2006, Neves filed a second motion to reopen proceedings, seeking readjustment of status under section 245(i) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1255(i). Now represented by another new attorney, Neves argued that the time and number limitations on his second motion should be equitably tolled, even though the motion was otherwise time- and number-barred, because of attorney Yerman's deficient performance in handling Neves's first motion to reopen.[1] Neves further claimed that he had exercised due diligence by consistently contacting Yerman between 2003 and 2006 for updates on the status of his first motion to reopen. Neves said he was informed by one of Yerman's employees that the BIA might take years to issue its decision and that he should be patient. He provided no independent corroboration of his assertions. Neves claimed he only discovered in early June 2006 that the BIA had denied his first motion to reopen in 2003.

On December 14, 2006, less than six months later, the BIA denied this second motion to reopen as time- and number-barred and found Neves ineligible for equitable tolling. Though the BIA found that Neves had substantially complied with the requirements to show ineffective assistance of counsel by

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[1] Specifically, Neves claimed Yerman failed to file appropriate documentation in support of his first motion to reopen, did not ask for appropriate relief, and failed to notify Neves of the BIA's denial of relief for three years.

Yerman, it also found that Neves had failed to demonstrate he had exercised due diligence in pursuing his claim. Neves, the BIA found, was unable to provide the dates or details of when he contacted Yerman from 2003 to 2006 or to provide "sufficient specific, relevant information to corroborate his generalized assertion of due diligence." The BIA also declined to *sua sponte* reopen the motion. This petition followed.

II.

A. Jurisdiction

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) amended the INA by, inter alia, explicitly identifying several immigration matters "not subject to judicial review." 8 U.S.C. § 1252(a)(2); *Kucana*, 130 S. Ct. at 828. Insulated matters include any action of the Attorney General "the authority for which is specified under this subchapter to be in the discretion of the Attorney General." 8 U.S.C § 1252(a)(2)(B)(ii). *Kucana* held, on statutory construction and separation of powers grounds, that this exclusion from judicial review did not preclude review of decisions left to the discretion of the Attorney General by regulation and not by statute. *Kucana*, 130 S. Ct. at 831.

Two precepts relevant to this case flow from that holding. First, because motions to reopen belong to the category of decisions committed to the Attorney General's discretion by regulation, and not by statute, *Kucana* expressly held that courts generally have

jurisdiction to review the BIA's decision to grant or deny these motions. *Id.* at 840. This case therefore falls into the general category of matters over which we can exercise jurisdiction. Neves has petitioned for review of the BIA's denial of his second motion to reopen, and his petition implicates none of the other jurisdictional bars set out in 8 U.S.C. § 1252(a)(2).[2]

Second, unless barred by statute from review, denials of motions to reopen are generally subject to judicial review irrespective of whether the BIA's decision rested on a legal or constitutional ruling. The existence of a legal or constitutional question, as opposed to a factual issue, only restores jurisdiction over matters otherwise barred from review. *See* 8 U.S.C. § 1252(a)(2)(D). Courts do not lose jurisdiction to review the BIA's denial of a motion to reopen or other ordinarily reviewable matters merely because the BIA rested its conclusion upon an underlying factual determination. *See id.*

Our earlier opinion held that no legal or constitutional issues were raised by the BIA's determination that Neves's time- and number-barred motion to reopen was not subject to equitable tolling because of Neves's failure to show due diligence. *See Neves*, 568 F.3d at 42. On that basis, we held we were barred

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[2] Neves has not sought review of any of the kinds of decisions on admissibility by immigration officers insulated from review under 8 U.S.C. § 1252(a)(2)(A), and he is not removable as an aggravated felon, *see id.* § 1252(a)(2)(C).

from exercising jurisdiction to review the BIA's decision. *See id.* at 42-43. That holding, as *Kucana* makes clear, was erroneous.[3]

Kucana does not affect the subsidiary holding in our earlier opinion that federal courts lack jurisdiction to review the BIA's decision to exercise or decline to exercise its *sua sponte* authority to reopen proceedings. Such decisions are "committed to [the BIA's] unfettered discretion" by law, *Luis* v. *INS*, 196 F.3d 36, 40 (1st Cir. 1999); *see also* 8 C.F.R. § 1003.2(a), and "the very nature of the claim renders it not subject to judicial review," *Luis*, 196 F.3d at 40; *see also Caldero-Guzman* v. *Holder*, 577 F.3d 345, 348 (1st Cir. 2009). Nor does it affect our earlier determination that no constitutional claims were presented.

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[3] Several of this circuit's earlier cases also relied on this erroneous premise. *Boakai* v. *Gonzales*, 447 F.3d 1 (1st Cir. 2006), first raised this premise, though its ultimate holding of a lack of jurisdiction rested on the petitioner's status as an alien removable as an aggravated felon. *Id.* at 4. In *Fustaguio do Nascimento* v. *Mukasey*, 549 F.3d 12 (1st Cir. 2008), this court suggested that it lacked jurisdiction to review a factual determination by the BIA that a petitioner's lack of diligence made her ineligible for equitable tolling, *id.* at 18-19, but held on the merits that the BIA's factual determination was not an abuse of discretion, *id.* at 19. In *Ouk* v. *Mukasey*, 551 F.3d 82 (1st Cir. 2008), this court denied review of the alien's petition on purely jurisdictional grounds, reasoning that the BIA had made a factual determination that the alien had not exercised due diligence and was ineligible for equitable tolling. *Id.* at 83.

B. Equitable Tolling

We turn to Neves's argument that the BIA abused its discretion by refusing to allow his otherwise time- and number-barred second motion to reopen by application of equitable tolling. We review the BIA's decision to grant or deny a motion to reopen for abuse of discretion. *Vaz Dos Reis* v. *Holder*, 606 F.3d 1, 3 (1st Cir. 2010). We "uphold the agency's subsidiary findings of fact as long as they are supported by substantial evidence," *id.*, and we "set[ ] aside a decision only where it rests on an error of law or reflects arbitrary or capricious decisionmaking," *Oliveira* v. *Holder*, 568 F.3d 275, 277 (1st Cir. 2009). There was no error of law and the decision was far from arbitrary or capricious.

We assume arguendo, but do not decide, that the time and number limits on motions to reopen are subject to equitable tolling. *See Chedid* v. *Holder*, 573 F.3d 33, 37 (1st Cir. 2009) (noting that this issue remains an open question in this circuit). Even if available in this context, equitable tolling "is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." *Wallace* v. *Kato*, 549 U.S. 384, 396 (2007); *see also Jobe* v. *INS*, 238 F.3d 96, 100 (1st Cir. 2001) (en banc).

"Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005); *see also*

Holland v. *Florida*, No. 09-5327, 2010 WL 2346549, at *12 (U.S. June 14, 2010); *Neverson* v. *Farquharson*, 366 F.3d 32, 42 (1st Cir. 2004).[4]

The equitable tolling doctrine extends statutory deadlines in extraordinary circumstances for parties who were prevented from complying with them through no fault or lack of diligence of their own. *See Fustaguio Do Nascimento* v. *Mukasey*, 549 F.3d 12, 18-19 (1st Cir. 2008); *Gonzalez* v. *United States*, 284 F.3d 281, 291 (1st Cir. 2002). A party seeking equitable tolling must have diligently pursued his rights for the entire period he seeks tolled, not merely once he discovers the underlying circumstances warranting tolling. *See Iavorski* v. *INS*, 232 F.3d 124, 134 (2d Cir. 2000). The BIA could conclude that Neves's failure to exercise due diligence was fatal to his equitable tolling argument.[5] *See Chedid*, 573 F.3d at 37; *see also Vaz Dos Reis*, 606 F.3d at 4 n.3.

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[4] In *Jobe*, this circuit listed five criteria for equitable tolling, which we consider as factors within the Supreme Court's two-part standard. Those criteria are "(1) a lack of actual notice of a time limit; (2) a lack of constructive notice of a time limit; (3) diligence in the pursuit of one's rights; (4) an absence of prejudice to a party opponent; and (5) the claimant's reasonableness in remaining ignorant of the time limit." 238 F.3d at 100; *see also Dawoud* v. *Holder*, 561 F.3d 31, 36 (1st Cir. 2009).

[5] We need not decide whether the ineffective assistance of counsel Neves alleged here qualified as an extraordinary circumstance. *Cf. Holland*, 2010 WL 2346549, at *13 (distinguishing between "garden variety claim[s] of excusable neglect," such as a "miscalculation" regarding a filing deadline, and "more serious instances of attorney misconduct"); *Rashid* v. *Mukasey*,

(Continued on following page)

Neves argues that the ineffective assistance of his counsel Yerman from 2003 until early June 2006, when Neves discovered Yerman's failure to apprise him of the BIA's 2003 decision, prevented him from timely seeking reopening. Neves says he exercised due diligence thereafter by filing his second motion to reopen on June 30, 2006, within one month of learning of Yerman's deficiency and the BIA's denial of his first motion to reopen.

The BIA did not base its denial of Neves's second motion to reopen on whether Neves had diligently pursued his rights after early June 2006. The BIA found that Neves failed to show that he had diligently pursued his rights before this point, from the date of the BIA's 2003 denial of his first motion to reopen through his discovery of Yerman's ineffective assistance in early June 2006.

Fatally to his claim, Neves did not timely contest the BIA's finding, and so it is waived.[6] The argument is in any event meritless. As the BIA found, neither Neves's affidavits regarding his contacts with

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533 F.3d 127, 130-31 (2d Cir. 2008) (requiring an alien to show that counsel's performance was so deficient that it violated due process).

[6] Neves challenges this finding only in his supplemental brief, arguing that the BIA wrongly concluded that no specific evidence supported his assertion of due diligence because it failed to give weight to a sworn affidavit from Yerman, Neves's previous counsel. Neves never made this argument in his original brief, and it is waived.

Yerman's office, nor Yerman's letter to Neves, provided any specific details about the employee responsible for not notifying Neves or the dates or frequency of Neves's contacts with Yerman's office regarding the status of his first motion to reopen. Substantial evidence supported the BIA's conclusion that Neves failed to show he exercised reasonable diligence during this period.

We cannot say the BIA abused its discretion in denying equitable tolling under these circumstances. *See Rashid* v. *Mukasey*, 533 F.3d 127, 132 (2d Cir. 2008) (requiring due diligence during "both the period of time before the ineffective assistance of counsel was or should have been discovered and the period from that point until the motion to reopen is filed"); *cf. Holland*, 2010 WL 2346549, at *14 (finding reasonable diligence in a habeas case when a habeas petitioner both repeatedly contacted his deficient counsel in the period before the AEDPA deadline elapsed and also prepared his own habeas petition and filed it the day he discovered the deadline had lapsed). We need not reach respondent's alternate argument that Neves had in any event failed to show a prima facie case for readjustment of status.

The petition is *denied*.

United States Court of Appeals
For the First Circuit

No. 07-1091

KELMER DA SILVA NEVES,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

ERRATA SHEET

(Filed Dec. 2, 2010)

The opinion of this Court issued on July 21, 2010, is amended as follows:

On page 9, line 12, the following footnote 4 is added at the end of the sentence:

> The Supreme Court in *Kucana* stated that it "express[es] no opinion on whether federal courts may review the Board's decision not to reopen removal proceedings *sua sponte*." *Kucana* v. *Holder*, 130 S. Ct. 827, 839 n.18 (2010). Because the Supreme Court declined to reach the issue, *Luis* is still controlling law. Further, we note that three circuits have concluded explicitly that *Kucana* does not change the prior rule on this point. *Gashi* v. *Holder*, No. 09-4200, 2010 WL 2563403, at *1

(2d Cir. June 22, 2010); *Ochoa* v. *Holder*, 604 F.3d 546, 549 & n.3 (8th Cir. 2010); *Jaimes-Aguirre* v. *U.S. Atty. Gen.*, 369 Fed. Appx. 101, 103 (11th Cir. 2010).

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

May 17, 2010

Mr. Saher J. Macarius
Law Offices of Saher J. Macarius
21 Walsh Street
Framingham, MA 01701

Re: Kelmer Da Silva Neves
v. Eric H. Holder, Jr., Attorney General
No. 09-650

Dear Mr. Macarius:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the First Circuit for further consideration in light of Kucana v. Holder, 558 U.S. ___ (2010).

The judgment or mandate of this Court will not issue for at least twenty-five days pursuant to Rule 45. Should a petition for rehearing be filed timely, the judgment or mandate will be further stayed pending this Court's action on the petition for rehearing.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

United States Court of Appeals
For the First Circuit

No. 07-1091

KELMER DA SILVA NEVES,

Petitioner,

v.

ERIC H. HOLDER, JR.,* ATTORNEY GENERAL,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER
OF THE BOARD OF IMMIGRATION APPEALS

Before
Lynch, *Chief Judge*,
Torruella and Ebel,** *Circuit Judges*.

Saher Joseph Macarius with whom Audrey Botros and Law Offices of Saher Joseph Macarius were on brief for petitioner.

Stacey I. Young, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, with

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* Pursuant to Fed. R. App. P. 43(c)(2), Attorney General Eric H. Holder, Jr. has been substituted for former Attorney General Michael B. Mukasey as the respondent.

** Of the Tenth Circuit, sitting by designation.

whom Michael F. Hertz, Acting Assistant Attorney General, and J. Max Weintraub, Senior Litigation Counsel, were on brief for respondent.

June 4, 2009

PER CURIAM. Petitioner Kelmer Da Silva Neves, a native and citizen of Brazil, petitions for review of the denial by the Board of Immigration Appeals of his second motion to reopen, which the Board denied on December 14, 2006. Neves's first motion to reopen was denied on December 3, 2003 due to his failure to exercise due diligence in seeking reopening of a September 25, 2001 decision by the Board, which dismissed his asylum appeal.

The second motion to reopen, the denial of which is now before us, was filed on June 30, 2006 and was denied by the Board as untimely and numerically barred. *See* 8 U.S.C. § 1229a(c)(7)(A); 8 C.F.R. § 1003(c)(2). Neves's second motion sought reopening of the Board's December 3, 2003 decision.

The Board rejected Neves's argument that the time and number limits should be equitably tolled so he could seek adjustment of status under § 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i). *See* 8 C.F.R. § 1003.2(c)(2). The Board found that while Neves had substantially complied with the requirements to show ineffective assistance of counsel under *In re Lozada*, 19 I. & N. Dec. 637 (BIA 1988),

he nonetheless had failed to show that he exercised due diligence in seeking reopening.

We need not and do not decide whether the statutory provision limiting motions to reopen is subject to equitable tolling. Even if it were, the equitable tolling doctrine is unavailable to a party who has failed to exercise due diligence, as the BIA found here. *Boakai* v. *Gonzales*, 447 F.3d 1, 3 (1st Cir. 2006) ("[I]f the equitable tolling doctrine is available at all, the petitioner must first show that he has acted with due diligence.").

No constitutional claim or issue of law is raised by petitioner as to the Board's finding of lack of diligence, contrary to the assertions in his reply brief.[1] And where the Board has made a factual determination of lack of due diligence not raising an issue of law or a constitutional claim, under the provisions of the REAL ID Act, 8 U.S.C. § 1252(a)(2)(B)(i), (D), we have held we lack jurisdiction to review the Board's decision. *Ouk* v. *Mukasey*, 551 F.3d 82, 83-84 (1st Cir. 2008); *Fustaquio Do*

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[1] Because the BIA denial was based on a lack of diligence, the claim of ineffective assistance of counsel is not before us. Indeed, the BIA found lack of diligence even assuming counsel was ineffective. Further, even if we had jurisdiction, the ineffective assistance claim is waived. *See United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

Nascimento v. *Mukasey*, 549 F.3d 12, 18-19 (1st Cir. 2008); *see also Boakai*, 447 F.3d at 4.

The Board further declined to exercise its authority to sua sponte reopen. We have no jurisdiction over this latter decision. *Peralta* v. *Holder*, No. 08-2073, ___ F.3d ___, 2009 WL 1475557, at *6-8 (1st Cir. May 28, 2009); *Luis* v. *INS*, 196 F.3d 36, 40 (1st Cir. 1999).

The petition is *dismissed* for lack of jurisdiction.

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board
of Immigration Appeals

File: A77 549 308 – Boston Date: DEC 14 2006

In re: KELMER DA SILVA *NEVES*

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Joseph Rose, Esquire

ORDER:

PER CURIAM. This case was last before the Board on December 3, 2003, when we denied the respondent's untimely motion to reopen. The respondent's prior motion to reopen was denied because, *inter alia*, the respondent failed to exercise due diligence in seeking reopening of our September 25, 2001, decision dismissing his appeal (BIA Dec. dated 12/3/03). *See Jobe v. INS*, 238 F.3d 96, 98-99 (1st Cir. 2001). On June 30, 2006, the respondent filed his second motion to reopen. The motion is untimely and number-barred. *See* 8 C.F.R. § 1003.2(c)(2). The respondent contends that the time and number limits for filing his motion should be equitably tolled because he received ineffective assistance of counsel. The respondent has substantially complied with the requirements of *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003) and *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd* 857 F.2d 10 (1st Cir. 1988). The respondent requests that his proceeding be reopened and

the record remanded so that he may seek adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i).

The respondent failed to demonstrate, however, that he exercised due diligence in seeking reopening. *See Jobe v. INS*, *supra*. *See also Chen v. Gonzales*, 415 F.3d 151, 154 (1st Cir. 2005). The respondent claims that 3 years after his former attorney, Gary Yerman, filed a motion to reopen, he went to Mr. Yerman's office in June 2006 and learned that the motion had been denied during December 2003. The respondent alleges that he had frequently contacted Mr. Yerman's office to inquire about the status of the motion and was advised to be patient. The respondent also included a letter from Mr. Yerman, which states that the employee who allegedly failed to notify him of the denial was fired. The respondent and Mr. Yerman fail, however, to identify the particular employee responsible for notifying the respondent. Further, the respondent has not provided the dates that he contacted his former attorney's office from 2003 to 2006, or who he spoke to when he contacted the office. In short, the respondent has not provided sufficient specific, relevant information to corroborate his generalized assertion of due diligence.

Further, we decline to exercise our *sua sponte* authority. *See* 8 C.F.R. § 1003.2(a); *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999) (fundamental change in law may warrant *sua sponte* reopening notwithstanding otherwise applicable time and number limitations on motions); *Matter of J-J-*, 21 I&N Dec. 976 (BIA

1997) (Board retains limited discretionary power under the regulations to reopen or reconsider only in exceptional circumstances). Accordingly, the motion is denied.

/s/ Frederick D. Hess
FOR THE BOARD

United States Court of Appeals
For the First Circuit

No. 07-1091

KELMER DA SILVA NEVES

Petitioner

v.

ERIC H. HOLDER, Attorney General

Respondent

Before
Lynch, *Chief Judge*,
Torruella, Ebel,* Boudin, Lipez,
Howard and Thompson, *Circuit Judges*.

ORDER OF COURT

Entered: **December 2, 2010**

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en bane be *denied*.

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* Of the Tenth Circuit, sitting by designation.

By the Court:
/s/ Margaret Carter, Clerk

cc:
LaTia N. Bing
Mary A. Kenney
Saher Joseph Macarius
Beth Werlin
Stacey Ilene Young
Kelmer Da Silva Neves

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 5 Section 701(a) of the United States Code provides in relevant part:

> (a) This chapter applies, according to the provisions thereof, except to the extent that –
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

Title 8 Section 1252 of the United States Code provides in relevant part:

> (a) Applicable provisions
>
> (1) General orders of removal an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.
>
> (2)
>
> * * *
>
> (B) Denials of discretionary relief
>
> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal

proceedings, no court shall have jurisdiction to review –

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(D) Judicial review of certain legal claims Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

* * *

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision

of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

* * *

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or

Title 8 Section 1003.2(a) of the Code of Federal Regulations provides in relevant part:

> (a) General. The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.